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Supreme Court of the United States

OCTOBER TERM, 1961.

DORA S. MAYER and SIMON MAYER,
Libelants-Petitioners,
against

ZIM ISRAEL NAVIGATION CO., LTD.
and the SS. *ISRAEL*,
Respondent-Respondent.

BRIEF OF RESPONDENT, ZIM ISRAEL NAVIGATION CO., LTD., IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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OCTOBER TERM, 1961.

DORA S. MAYER and SIMON MAYER,
Libelants-Petitioners,

against

ZIM ISRAEL NAVIGATION CO., LTD.
and the SS. *Israel*,
Respondent-Respondent.

BRIEF OF RESPONDENT, ZIM ISRAEL NAVIGATION CO., LTD., IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

STATEMENT.

Petitioners are husband and wife who sued in Admiralty to recover damages for personal injuries occurring to Dora S. Mayer on January 6, 1956 while she was a passenger aboard respondent's vessel, the SS. *Israel*. The action in the District Court for the Southern District of New York was dismissed after trial because of failure of any proof of negligence on the part of the respondent. On appeal to the United States Court of Appeals for the Second Circuit, the dismissal was affirmed and a subsequent petition for rehearing was denied on May 17, 1961.

JURISDICTION.

It is conceded that this Court has jurisdiction to review the proceedings below by reason of 28 U. S. C. §1254(1) and 2101(c). However, the petition fails to show any

important reasons to justify a review of this case by this Court and that there exists any of the grounds for granting a writ as set forth in Rule 19 of the Revised Rules of this Court.

Questions Presented.

1. Did the District Court make adequate and specific findings of fact upon which it based its conclusion that respondent was not negligent?

2. Was the Court below correct in affirming the District Court's dismissal of the libel because it concluded that the District Court's findings were not clearly erroneous?

Counter Statement of Facts.

The petitioner, Dora S. Mayer, aged 49, boarded the SS. *Israel* at Haifa, Israel on January 6, 1956 and was escorted by one of the vessel's stewards to cabin 302, which was designated on her passage ticket as her cabin and was shown to berth D, an upper berth, which was also indicated on the ticket. Cabin 302 was of the dormitory type and contained four double berths consisting of an upper and lower berth (6).* The door to cabin 302 opened inward with the hinged side of the door on the left as the cabin was entered. Mrs. Mayer's berth extended lengthwise towards the portholes of the cabin with the inside of the berth against the wall and the other side of the berth a half or one inch from the hinged side of the cabin door (149). In other words, the outside of Mrs. Mayer's berth was directly to the left of the door as one entered the cabin and when the door was fully opened, it rested against the outside edge of the berth and ran parallel to it.

* References are to the stenographers minutes.

Shortly after being assigned to her cabin, Mrs. Mayer decided to rest in her berth because she was tired (11). She testified that she ascended into the berth by means of a ladder which the steward then took away. She did not know what he did with it, but later when she awoke, she saw it hanging on the wall on two nails between the door and her berth about thirty inches from the berth (12, 13, 14). Respondent's evidence clearly showed that it was physically impossible for the ladder to be placed on the wall between the door and the berth because the space was only at most an inch wide and the ladder was eighteen inches to two feet in width (66).

When Mrs. Mayer awoke, the SS. *Israel* was under way leaving the Port of Haifa (21). Since she was desirous of leaving her berth, she reached for the ladder with her left arm which, as indicated above, she says was on the wall between her berth and the door and in doing so, she fell out of the berth to the deck below and sustained her injuries.

Assuming, arguendo, that the ladder was located between the door and the berth, and taking any of the versions described by Mrs. Mayer as to her position in the berth when reaching for the ladder, the fact remains that her accident was due entirely to her own fault because if the ladder was not within her reach from the position that she was in when she awoke, then she should have moved herself in the berth to a point where she could have reached the ladder. If the ladder was too far from her berth to have been reached by her, no matter what position she took, then she should have asked one of the other seven passengers (46) in the cabin to obtain it for her. Even assuming she did not speak the language of the other passengers, surely she could have made her wish known to them. In any event, the evidence shows that she did not even attempt to

call the passengers, but upon awakening, immediately reached for the ladder (45).

Mrs. Mayer's testimony was definite and specific that the ladder she had used in ascending to her berth was movable and had been placed on the wall adjacent to her bunk (11, 12). However, respondent's witnesses contradicted this and stated it was permanently affixed to the bunk and their testimony was accepted over that of Mrs. Mayer's by the lower court. Furthermore, respondent's proof showed conclusively that it was physically impossible for the ladder to have been placed where Mrs. Mayer asserted it was.

After the accident, the ship's doctor was summoned to Mrs. Mayer's cabin. According to her testimony, he rotated her injured leg "for about an hour—for 5 minutes he was turning very painfully my leg, up and down telling me this was nothing dangerous" (22). She further testified that she was removed from her cabin to the ship's hospital by being dragged along the deck by four men (69). This was contrary to what Mrs. Mayer had testified to in her deposition on December 12, 1958, when she said that she had been taken from her cabin to the ship's hospital by stretcher (72). It was also contrary to respondent's witnesses Seckback and Strauss who testified that she was taken from the cabin on a stretcher (177, 189).

In regard to Mrs. Mayer's testimony as to the rotating of her leg by the ship's doctor, Dr. Irvin Balensweig, who testified for respondent, said that the manipulation of the leg by the ship's doctor as described by Mrs. Mayer "would not cause any difficulty with the hip; it would not prevent any healing or anything else" (166). Even Mrs. Mayer's witness, Dr. Raisman, admitted on cross-examination that he did not know whether there was any damage to the capsule of the hip as a result of the actions of the ship's doctor (114). Also, Dr. Raisman was vague in his testimony as

to what effect the waiting for the setting of the leg until the ship arrived in Naples, Italy three days later had on the libelant's condition. Respondent's witness, Dr. Balensweig, expressed the definite opinion that it would have had no effect (166).

In summary, Mrs. Mayer's case hinged on whether the ladder in question had been removed and put at a place beyond her reach and whether the doctor and others mistreated her after her accident. The district court, after hearing all the evidence and seeing the exhibits, concluded that the ladder to Mrs. Mayer's berth was not removable, but permanently affixed to the berth and that she fell due to her own negligence and that the respondent was in no way negligent.

Reasons for Denying the Writ.

The petitioners' brief fails to show that this case is of any general importance or that the decision of the Court below was based upon legal principles which are in conflict with those of any of the other Courts of Appeals. The petitioners for the most part, are asking this Court to disregard its rules and review the evidence and findings of the District Court and the conclusion of the Court of Appeals that such findings were not clearly erroneous. In addition, it is asking this Court to completely disregard petitioner, Dora S. Mayer's sworn testimony as to the facts upon which she originally based her theory of liability and to decide that the District Court should have determined whether she can recover upon an entirely new set of facts which the District Court found based upon respondent's proof. The certiorari jurisdiction of this Court should not be used to further such a cause as this. It is well recognized that the power of this Court to review is sparingly exercised as clearly set forth in Justice Frankfurter's dis-

senting opinion in *Rogers* v. *Missouri Pacific R. R. Co.*, 352 U. S. 500 at pp. 530-531 in which he stated:

> "Thereafter such [FELA] cases could be reviewed by the Supreme Court only on certiorari to 'secure uniformity of decision' between the Circuit Courts of Appeals and 'to bring up cases involving questions of importance which it is in the public interest to have decided by this Court of last resort. The jurisdiction was not conferred upon this Court merely to give the defeated party in the Circuit Court of Appeals another hearing. . . . These remarks, of course apply also to applications for certiorari to review judgments and decrees of the highest Courts of States'. *Magnum Co.* v. *Coty*, 262 U. S. 159, 163-164. (See also *Hamilton-Brown Shoe Co.* v. *Wolf Brothers & Co.*, 240 U. S. 251, 257-258; Certiorari jurisdiction 'is a jurisdiction to be exercised sparingly, and only in cases of peculiar gravity and general importance, or in order to secure uniformity of decision.')"

Argument.

The petitioners' present position, in substance, is that Dora S. Mayer was injured because the ladder to her berth was taken away by the ship's steward and placed in such a position on the wall that she could not reach it. However, since the respondent has proven that the ladder was permanently affixed to the berth and furthermore, could not possibly have been where Dora S. Mayer swore it was, then the District Court should have disregarded her sworn testimony and should have determined if the respondent was liable to her upon an entirely different factual basis, even though at that juncture of the proceedings she was content to rely entirely on her version of the accident. No request or suggestion was made to the trial judge that he consider respondent's proof in determining liability.

In other words, the petitioner alleged and attempted to prove her cause of action based upon one set of facts, namely that the ladder was removed from her bunk, but since the District Court did not believe her testimony and found that the ladder was permanently affixed to her berth, she would like a determination as to whether there was any liability under these facts.

Perhaps, if petitioners at trial had moved to amend their cause of action to include a claim under these new facts, the District Court, in its discretion, might have given it some consideration. However, petitioners were satisfied at the conclusion of the trial and on their original appeal to the Court of Appeals to rely on the testimony of Mrs. Mayer as representing an accurate and truthful version as to the conditions existing at the time of her accident and the cause of it. Then, when the Court of Appeals did not find any error in the District Court disbelieving Mrs. Mayer's testimony and accepting respondent's proof, they for the first time on a petition for rehearing and now in this Court ask that a determination be made as to the possible liability of the respondent under facts which they say did not exist. For a litigant to be permitted to proceed in this manner would undermine the pleading practice of our judicial system wherein the issues are set up and defined before trial and the parties are apprised of the proof needed to support their respective positions. In addition, such a practice would tend to make the trial of a law suit very much like a game of chance wherein a losing party could abandon the set of facts upon which he based his theory of liability and adopt another on the hope that he might be more successful with them and then if these did not result in victory, try a new set. The absurdity of such a practice is clear and points up the

chaos that would result from it. In addition it would extend interminably the course of litigation.

The petitioners in their brief, to a large extent, base their application for review by this Court on the fact that the District Court and the Court of Appeals did not make adequate and sufficient findings of fact upon which the conclusion was reached that the respondent was not negligent and that petitioner, Dora S. Mayer was solely negligent. If it be assumed for the moment that there were adequate findings with respect to the absence of negligence on the part of the respondent but that there were inadequate findings with respect to the determination that petitioner, Dora S. Mayer was contributorily negligent, this latter error would be of no significance because whether or not Dora S. Mayer was contributorily negligent, either in whole or in part, would be irrelevant once it was determined respondent was not negligent.

Contrary to what is stated by the petitioners in their brief, the District Court, although it did not make separate findings of fact and conclusions of law, nevertheless did make adequate and specific findings in its opinion which it dictated at the conclusion of the trial. The opinion is replete with factual findings indicating the basis upon which it reached the legal conclusion that the respondent was not negligent. It would serve no useful purpose to set forth specifically each finding so made because the opinion clearly speaks for itself.

It was not necessary for the Court to make separate itemized findings of fact and conclusions of law outside the body of its opinion. All that the rule requires, as indicated by the cases cited below, is that the Court in its opinion sufficiently indicate the factual and legal basis for its conclusion. As was said by Judge Lumbard in

Hecht, Levis & Kahn, Inc. v. *The S. S. President Buchanan*, 2 Cir. 1956, 236 F. 2d 627 "failure to make separately itemized findings and conclusions is not reversible error under Admiralty Rule 46½ so long as the opinion of the trial judge clearly states the findings and conclusions upon which the judgment is based. *United States* v. *Ladd*, 1952 A. M. C. 277, 193 F. 2d 929, 930 (4 Cir., 1952); *Koehler* v. *United States*, 187 F. 2d 933, 938 (7 Cir., 1951); cf. *Kelley* v. *Everglade Drainage District*, 319 U. S. 415, 422 (1943)." This the District Court has done.

Conclusion.

The petition fails to present any important reason for granting the writ and no substantial question is raised. The petitioners' libel was properly dismissed and it is respe tfully submitted that this Court deny the petition.

Respectfully submitted,

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